NO. 83-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALAN J. KARCHER, SPEAKER NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

BRIEF OF AMICI CURIAE, THE COUNTY OF ESSEX, NEW JERSEY, AND THE TOWNSHIP OF BELLEVILLE, NEW JERSEY, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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Interest of *Amici Curiae*

From 1972 until 1982 the citizens of Essex County, New Jersey constituted the bulk of two congressional districts, and the interests of Essex County were represented in the

United States House of Representatives by two Congressmen.[1] As a result of the population data reflected in the 1980 census, New Jersey was required to reduce its congressional seats from fifteen to fourteen. The New Jersey legislature then enacted a redistricting plan which this Court invalidated, stating:

> The District Court properly applied the two-part test of *Kirkpatrick* v. *Preisler* to New Jersey's 1982 apportionment of districts for the United States House of Representatives. It correctly held that the population deviations in the plan were not functionally equal as a matter of law, and it found that the plan was not a good-faith effort to achieve population equality using the best available census data. *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653, 2655 (1983).

On remand, the district court selected a plan put forth by one of the parties without any legislative imprimature.[2]

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[1] *David* v. *Cahill*, 342 F. Supp. 463 (D.N.J. 1972).

The court in *David* fashioned congressional districts which remained in use until 1980. Essex County comprised the bulk of the 10th and 11th Districts. The 11th District included Nutley, Bloomfield, Belleville, Montclair, Verona, Cedar Grove, Caldwell, West Caldwell, North Caldwell, Fairfield, Essex Fells, Roseland, Orange, West Orange, South Orange, Maplewood and Irvington as well as the Passaic County municipalities of Little Falls and West Paterson, the Union County municipality of Hillside and the Bergen County community of North Arlington. The 10th District included Newark, East Orange, Glen Ridge and the Hudson County community of Harrison. Millburn and Livingston were in the Fifth District with all of Somerset County and parts of Mercer, Middlesex and Morris Counties.

[2] *Daggett* v. *Kimmelman*, —— F.Supp. —— (D.N.J. 1983), Appellant's App. 1a-30a.

This appeal challenges the propriety of the district court's actions.

Amici take the position that the district court by the manner in which it selected its own redistricting plan discouraged and precluded the legislature from enacting a state plan. The court also failed to find that it was impossible to fashion congressional districts of precisely equal size and selected a plan which neither meets the valid policy considerations of the state of New Jersey nor adequately represents the citizens of *amicus* Essex County and its constituent municipality, *amicus* Belleville, New Jersey.

Essex County is a densely populated, urban, industrialized county located in northeastern New Jersey. Included among its twenty-two municipalities is Newark, the state's largest city, with a population of 329,248.[3] More than 40% of county residents are of minority origin.[4] Many are indigent. One out of every six Essex County residents receives some form of public assistance.

Essex County is a body corporate and politic with perpetual succession. N.J.S.A. 40:41A-24. County government is responsible for performing a wide variety of functions and constitutes a basic unit of government. Among the mandatory duties performed by the county are the administration of the courts, maintenance of the office of the prosecutor, N.J.S.A. 2A:158-1 *et seq.*, administration of elections, N.J.S.A. 54:1-36 *et seq.*, voter registration, N.J.S.A. 19:31-2 *et seq.*, administration of public assistance, N.J.S.A. 44:10-1 *et seq.*, maintenance of county roads and facilities including a county jail, jail annex,

[3] 1980 Census.

[4] 1980 Census.

geriatric hospital and hospital for the mentally ill. Other services provided by the county include maintenance of an extensive system of parks, recreation and cultural facilities as well as a vast array of social and health services. A number of federally supported programs are administered at the county level, the largest of which is Aid to Dependent Children. N.J.S.A. 44:10-2. The county has the duty to levy and collect taxes from its constituent municipalities as well as the power to receive and to disburse state and federal funds. N.J.S.A. 40A:4-12.

The executive power of the county vests in the Essex County Executive. It is his duty to "[e]nforce the county charter, the county's laws and all general laws applicable thereto," as well as to supervise the care and custody of all county property, institutions and agencies. N.J.S.A. 40:41A-36. The legislative power of the county vests in the Board of Chosen Freeholders. N.J.S.A. 40:41A-38. On March 14, 1984, the Essex County Board of Chosen Freeholders enacted a resolution disapproving of the Congressional redistricting plan selected by the three-judge district court in this action.[5]

The redistricting plan selected by the court is harmful to Essex County in a variety of ways. The population of Essex now warrants representation by 1.6 rather than 2.0 congressmen. However, although Essex encompasses only 127 square miles and is geographically among the smallest and most compact counties in New Jersey, the plan selected by the district court fragments Essex into four parts. Middlesex is the only other county the plan divides in four. Essex is the principal constituent in only one of the districts, the Tenth. Morris County is the principal constituent of the Eleventh Congressional District. Essex

[5] Appendix A.

County formerly constituted the largest segment of the Eleventh District. The district now stretches from surburbs close to New York City almost to the Pennsylvania border. Essex County residents now comprise less than one-third of the district. Another segment of Essex County residents now comprises less than one third of the Eighth Congressional District which is dominated by Passaic County. Millburn Township is the only Essex County municipality placed in the Seventh Congressional District.

The fragmentation created by the redistricting plan dilutes the vote of Essex County residents. The congressman of each of these districts, with the exception of the Tenth, will focus less upon the particular needs of Essex County. Essex County's interests will have to be balanced with the often conflicting interests of other counties. Morris, Sussex and Warren Counties which make up the rest of the Eleventh District, are principally suburban or rural. The problems of an urban, industrial population do not dominate their concerns.

Some budget figures highlight this problem. In 1983 Essex County received $162,404,835 in federal funds. This is more than twice as much as the county received from the State of New Jersey. The largest portion of these funds went towards public assistance grants and social services. The loss of meaningful access to a congressman may mean harm to a great number of poor people.

Compounding these problems, the redistricting plan severs the Township of Belleville in two. Neither part of Belleville remains in the same Congressional district it has been in since 1972. *Amicus* Belleville is a municipality with a total population of 35,367[6] bordered on the South by Newark, to the West by Bloomfield, to the North

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[6] 1980 Census.

by Nutley and to the East by the Passaic River. Pursuant to the court's plan 30,488 Belleville citizens will be placed in the Eighth Congressional District along with the residents of Bloomfield, Glen Ridge, Montclair and Nutley, for a total of 153,454 Essex County residents, along with 361,334 Passaic County residents. The remaining 4,879 citizens are placed in the Tenth Congressional District along with the citizens of East Orange, Irvington, Newark, Orange and the Union County municipality of Hillside.[7] It is the undisputed policy of New Jersey not to split municipalities when fashioning congressional districts.[8] The other plans submitted to the court did not split municipalities. The division of Belleville is not related to any geographic or neighborhood factors. Instead, three wards from a single municipal district are separated from the rest of the town. The result is an administrative nightmare and an affront to long established state policy.

Summary of Argument

In cases involving congressional reapportionment courts should make every effort to encourage states to enact constitutional congressional districts. To do otherwise runs the risk of permanently removing from the legislature the power to reflect state goals in the establishment of congressional districts and effectively renders meaningless the principle of equal representation, because people with similar concerns will not be voting in the same district.

In this case the district court insinuated itself directly into the legislative process by providing the legislature

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[7] *Daggett*, —— F.Supp., at ——, Appellant's App. 24a.

[8] *Id.*, —— F.Supp., at ——, Appellant's App. 12a.

with inadequate time in which to enact a redistricting plan and by adopting a partisan, political plan as its own. It threw the "equal representation" mandate of Art. I, §2 of the Constitution, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) to the "lowest bidder". The district court did not find that it was impossible to establish districts of equal population. It simply selected the first plan presented to it with the lowest population differences. This plan was no more and no less political in bias than were the other plans submitted. Valid state policy considerations pertinent to redistricting such as preserving county and municipal boundaries were sidestepped or ignored.

The increase in litigation surrounding congressional apportionment plans suggests that a different approach is warranted. The goal should be not only constitutional districts but districts drawn by the states themselves. Achieving an irreducible deviation among districts may be a job for the courts; but selecting among plans which are unavoidably partisan is not. Neither is it fundamentally a judicial task to decide which state interests in addition to equality to promote.

That is why judicial remedies for unconstitutional districting schemes should be as distasteful to the states as possible. They should be designed both to achieve equality and to impel state action. In New Jersey, this year, a hearing conducted to that end could produce a variety of redistricting schemes. All of them would meet the mandate of equality, but none of them would be palatable to the interests responsible for the present impasse. Hence, the chances are high that such remedies would achieve the atmosphere of compromise that lets government work.

ARGUMENT

I.

Redistricting schemes adopted by the courts must achieve irreducible population deviations in order that population variances among congressional districts will be unavoidable.

This Court has laid to rest the notion that *de minimis* population variances among congressional districts are acceptable. *Karcher* v. *Daggett,* —— U.S. ——, 103 S. Ct. 2653, 2658-59 (1983). "As between two standards—of equality or something less-than equality—only the former reflects the aspirations of Art., 1 §2." *Id.,* —— U.S., at ——, 103 S. Ct., at 2659. Recognizing, however, that some variations in population may be unavoidable, this Court established a two part test to be used in determining the acceptability of state sanctioned congressional apportionment plans, *Id.,* —— U.S., at ——, 103 S. Ct. at 2665; *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), as follows:

> Thus two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good faith effort to achieve equality, the State must bear the burden of proving that

each significant variance between districts was necessary to achieve some legitimate goal. *Kirkpatrick*, 394 U.S., at 532, *cf. Swann* v. *Adams*, 385 U.S. 440, 443-444 (1967). *Karcher*, —— U.S., at ——, 103 S. Ct., at 2658.

None of the plans reviewed by the three-judge district court bore the imprimature of State approval, all having either failed to be passed by the state legislature or to be signed by the governor. As a result, the district court was called upon to fashion its own remedy which it did by adopting a plan of one of the parties. The district court, however, did not find that population variances among districts were unavoidable as required by *Karcher* and *Kirkpatrick*. Having failed to so find the court should have proceeded no further.

If the district court assumed without deciding that some variation from absolute equality was unavoidable, or that a maximum variation of 25 persons, as in the redistricting plan selected by the court, constitutes a *de minimis* variation, then this is contrary to the decision in *Karcher* which absolutely rejects the concept of minimum variations. If 25 persons is an acceptable maximum variation, why not as few as 10 persons, or as many as 100 persons, when each of these variations is less than two-hundredths of one percent of the ideal 526,072 population of a New Jersey congressional district. The district court erred in accepting as the lowest possible population variance the first plan submitted by a party with the smallest numerical deviation. It is for the court, not the parties, to decide what will be the lowest acceptable population variance.

II.

Balancing legislative policies is not an appropriate role for the court.

As this Court has held, legitimate legislative policies may justify variances in population between congressional districts. *Karcher*, —— U.S., at ——, 105 S.Ct. at 2663. Among the legitimate legislative policies recognized by *Karcher* are "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives." *Id.*, —— U.S., at ——, 105 S.Ct. at 2663. Additional policy criteria recognized in New Jersey are "[m]inimum fragmentation of counties," "[r]ecognition of increases in population in newer communities and of decreases in population in older communities," and "[u]se as a starting point of the last legislative determination of appropriate districts." *David* v. *Cahill*, 342 F.Supp. 463, 469 (D.N.J. 1972).

The plan selected by the district court satisfies some of these policies, but so do all the other plans submitted. Each has its strengths and weaknesses. With respect to *amici*, the Eleventh District is compact in shape but not in size. It stretches almost the entire width of the state. Belleville's boundaries are not respected. More than one third of all county residents will be voting in different legislative districts than those in which they voted in 1982 or 1980. The County is divided into four parts.

The district court should not have reached any of these considerations. In fashioning a remedy the district court is held to a higher standard than is the state in developing a plan.[9] The plan selected by the court was not a

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[9] *Connor* v. *Finch*, 431 U.S. 407 (1977); *Chapman* v. *Meier*, 420 U.S. 1 (1975).

legislative enactment and was not entitled to any special deference on policy grounds. *Karcher*, —— U.S., at ——, 103 S.Ct., at 2662-2663; *White* v. *Weiser*, 412 U.S. 783 (1973). The district court by giving such credence to the policies in the plan selected stepped outside the bounds of judicial restraint, substituting its judgment for what should be that of the legislature.

Amici do not suggest that the court is precluded from considering state policy in evaluating reapportionment plans once a finding of irreducible population deviation has been made. Rather, the task must be approached gingerly. As this Court has stated:

> We have repeatedly emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds* v. *Sims*, 377 U.S., at 586, 84 S.Ct., at 1394, for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name. In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner "free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock*, 377 U.S. 695, 710 (1963); *Connor*, 431 U.S., at 1833-1834.

The plan selected by the district court does arbitrarily harm *amici*. The district court balanced state policy considerations incorrectly. The trade off between slightly higher population deviation in the other plans submitted to the court, any one of which would have been less harmful to *amici* herein, and the splitting of the county and the municipality is simply unreasonable.

III.

Judicial interventionism discourages the State from developing congressional election districts.

The district court did four things which undermined the likelihood that the state would enact a congressional redistricting plan. The state was not given enough time to act. The district court, on December 19, 1983, set February 3, 1984, as the date by which a redistricting plan could be legislatively enacted or further judicial proceedings would be held. *Dagget,* —— F.Supp., at ——, Appellants App. 4A. However, the primary election will not be held until June 5, 1984. N.J.S.A. 19:2-1. Nominating petitions need not be filed until the fortieth day preceding the election, N.J.S.A. 19:23-14, or April 26, 1984. Taking into consideration that several days may be needed to acquire the 200 signatures necessary for each candidate's nominating petition,[10] more than two and one-half months remained between the date for filing petitions and the date the district court entered its decision.

Secure in the knowledge that the district court would act, nothing compelled the state to act. There was no

[10] N.J.S.A. 19:23-8.

reason for the Democrat controlled legislature and the Republican Governor to compromise or to come together. Had the district court stayed its hand until the last possible moment in which to file nominating petitions additional pressure would have been placed on the legislature and the governor to agree on an apportionment scheme.

A. Prospective restrictions on redistricting plans are unwarranted.

As if to guarantee that the state would not reapportion congressional districts unless required to by the next decennial census the district court order of February 17, 1984 provides that "primary elections and elections for members of the House of Representatives shall be conducted, in New Jersey, until the further order of this court, or until the next decennial census, whichever is later . . ." *Daggett,* —— F.Supp., at ——, Appellants App. 33a.[11] The court has injected itself into the legislative process preempting the mandate to the legislature to apportion congressional districts, and ignoring the presumption that any legislative enactment will pass constitutional muster. There is no precedent for this requirement of prior court review of a validly enacted state redistricting plan.

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[11] Since 1972 elections for members of the House of Representatives in New Jersey have been based upon congressional districts created by the courts rather than by the legislature. *David* v. *Cahill,* 342 F.Supp. 463 (D.N.J. 1972) established congressional districts in New Jersey which were used from 1972 through 1980. In 1982, a plan enacted by the legislature actually was used for the congressional election, but only upon order of this Court that the state's plan could be utilized pending further judicial review.

B. The parties should not be permitted to define the parameters of the Constitution.

The broad role which the court permitted the parties to have in fashioning a judicial remedy further discouraged the legislature from enacting a redistricting plan and inappropriately restricted the responsibilities of the district court. In developing a reapportionment plan the court followed a procedure similar to the one used in *David* v. *Cahill*, 342 F. Supp. 463 (D.N.J. 1972). The parties were permitted to advance redistricting proposals and the court selected from among those submitted into evidence. *Daggett* v. *Kimmelman*, —— F.Supp., at ——. Appellant's App. 4a-5a.

No rationale, apart from that single precedent, is offered for this approach. Nor is the approach compelled by this Court's decision in *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983). *Karcher* places the burden of proof upon the parties. *Id.* 103 S.Ct. at 2658. The ultimate decision making remains with the court. Permitting the parties to dictate the remedy in a congressional redistricting case remove politics from the floor of the legislature and into the courtroom. Redistricting becomes a "winner take all" process, and the plans submitted reflect that. Prior to *David* v. *Cahill*, congressional districts in New Jersey were based, to the extent possible, on county lines.[12] Newer plans, on the other hand, seem to be framed with

[12] See, for example, *Jones* v. *Falcey*, 48 N.J. 25 (1966) which involved a challenge to the constitutionality of the Congressional District Act. The act preserved the lines of 15 out of 21 counties. In those few districts in which the court found the percent of deviation from the mathematical ideal to be too great, and thus, unconstitutional the remedy suggested was to move entire municipalities into abutting districts. *Id.*, 48 N.J., at 39.

litigation in mind. Population deviations are kept to a minimum, but Essex County is split in four and coupled with rural areas, while Belleville is split in two.

> More important, mere numerical equality is not a sufficient guarantee of equal representation. Although it directly protects individuals, it protects groups only indirectly at best. See *Reynolds* v. *Sims, supra,* 377 U.S., at 561, 84 S.Ct., at 1381. A voter may challenge an apportionment scheme on the ground that it gives his vote less weight than that of other voters; for that purpose it does not matter whether the plaintiff is combined with or separated from others who might share group affiliation. It is plainly unrealistic to assume that a smaller numerical disparity will always produce a fairer districting plan. *Karcher,* —— U.S., at ——, 103 S.Ct., at 2671. Stevens, J. concurring.

If litigation were not viewed as a way to gain political advantage, it would not be surprising to see the State return to the system of county based districts used before *David.*

C. Judicial remedies must minimize the need for continued judicial intervention and pressure the States to redistrict responsibly.

The plethora of cases challenging the composition of congressional districts as well as the number of states electing their members to the House of Representatives pursuant to court ordered rather than legislatively enacted plans suggests that the remedies employed by the district courts have not achieved the goal of state initiated congressional redistricting.

A remedy must be sufficiently unpalatable to provoke legislatures to enact constitutional redistricting plans rather than run the risk of judicial intervention. Selecting among plans which are unavoidably political is not a job for the courts. A refusal to select from among partisan schemes will encourage the States to take their redistricting obligations seriously.

CONCLUSION

All the redistricting plans submitted to the district court were partisan and political. The plan selected by the court impacts *amici* adversely. If this case is not remanded, there is a strong probability that, as has been the case since 1972, New Jersey will select its congressional representatives by a plan reflecting the preferences of the court rather than the will of the people.

The district court should be directed to take all steps necessary to encourage the state to develop a constitutional redistricting plan. If that fails, the court should develop its own plan rather than rely on a plan submitted by one of the parties. As a last resort, the court should re-evaluate the plans to select one which is more consistent with New Jersey state policy.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX A

Resolution No. 04086 of the Board of Freeholders, County of Essex

COUNTY OF ESSEX, NEW JERSEY

BOARD OF CHOSEN FREEHOLDERS

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

I Daniel W. Gibson, Jr. Clerk of the Board of Chosen Freeholders of the County of Essex in the State of New Jersey.

Do hereby certify, the foregoing to be a true copy of a resolution adopted at a meeting of said Board, on Wednesday the 14th day of March 1984, together with the certifications, signatures and endorsements thereon.

Resolution No. 04086

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said County at Newark, this 20th day of March A.D. 1984

DANIEL W. GIBSON, JR.
Clerk

(Seal)

Appendix A

RESOLUTION OF THE BOARD OF FREEHOLDERS
COUNTY OF ESSEX

Resolution No. 04086

Proposed by Board of Freeholders

Authority for Resolution N.J.S.A. 40:41

Authority for Action E.C.A.C. 3.11(L)

Subject:

RESOUTION OPPOSING COURT ORDER CONGRESSIONAL RE-DISTRICTING

Whereas, as a result of the most recent U.S. census, a re-districting of the Congressional districts in New Jersey was necessary; and

Whereas, in 1981, a plan was put forth which ultimately was declared unconstitutional because of population deviations among the districts; and

Whereas, while the New Jersey Legislature was attempting to reach agreement on a plan which would have districts equal in population, a special three Judge panel of the U.S. District Court promulagated a plan; and

Whereas this plan would divide Essex County into four separate Congressional Districts only one of which would be contained solely within the boundries of the County; and

Whereas, three of the districts will cross several different counties and contain municipalities which do not have any common interest with the Essex County municipalities; and

Appendix A

Whereas, the community of Belleville will be split between two Congressional Districts thereby causing confusion among the citizens, now, therefore, be it

Resolved, that the Essex County Board of Chosen Freeholders hereby expresses their strong disapproval of this plan and furthermore requests the Legislature appeal this plan to the U.S. Supreme Court.

Approved as to form and legality JOSEPH P. BRENNAN

Record of Board Vote (X = Vote N.V. = Abstention ABS = Absent)

Moved by Freeholder Greco

Seconded by Freeholder Parlavecchio

Freeholder:

Beatty Yes

Cifelli Yes

Clay Abstention

Davis Yes

Giblin Yes

Kay, V. Pres. Yes

Lustbader Abstention

Parlavecchio Yes

Greco, President Yes

Appendix A

It is hereby certified that the foregoing resolution was adopted by roll call vote at a regular meeting of the Board of Chosen Freeholders of the County of Essex, New Jersey, held on March 14, 1984.

JEROME D. GRECO
President